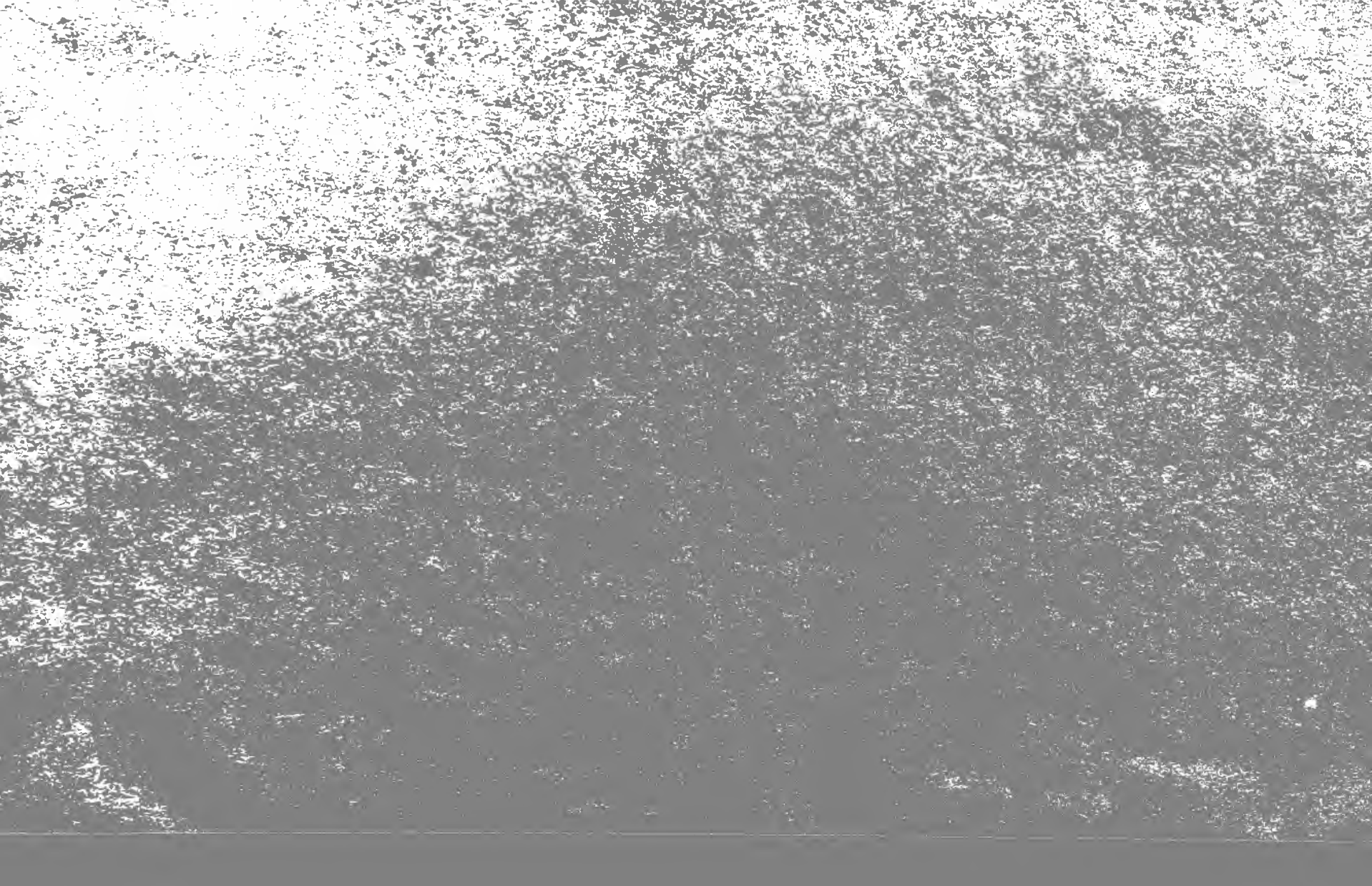

AGREEMENT

BETWEEN

WALSTON H. BROWN AND HERBERT P. BROWN,

PARTIES OF THE FIRST PART,

AND

WESTERN PACIFIC RAILWAY COMPANY.

PARTY OF THE SECOND PART.

FOR SUBMISSION TO ARBITRATION OF A CERTAIN CONTROVERSY.

Dated, February 25, 1907.

Agreement

BETWEEN

WALSTON H. BROWN and HERBERT P. BROWN,

parties of the first part,

AND

WESTERN PACIFIC RAILWAY COMPANY,

party of the second part.

For Submission to Arbitration of a Certain Controversy.

Dated February 25, 1907.

AN AGREEMENT made this 25th day of February, in the year One thousand nine hundred and seven, between WALSTON H. BROWN and HERBERT P. BROWN, co-partners doing business in the Borough of Manhattan, City of New York, as bankers and brokers under the name of "Walston H. Brown & Brothers" (hereinafter called the "plaintiffs"), parties of the first part, and the WESTERN PACIFIC RAILWAY COMPANY, a corporation existing under and by virtue of the laws of the State of California (hereinafter called the "defendant"), party of the second part.

WHEREAS, a controversy has arisen between the plaintiffs and the defendant with respect to a certain claim for compensation or damages made of and against the defendant by the plaintiffs (such claim being the only claim or demand against defendant asserted by plaintiffs), the issues between the parties with reference where-

to are raised by the statement of the plaintiffs hereto annexed and made a part hereof, marked "Exhibit A," and hereinafter referred to as the "complaint," and the statement of the defendant in response thereto, hereto annexed and made a part hereof, marked "Exhibit B" and hereinafter called the "answer" (said complaint and answer, together, being hereinafter called the "pleadings"); and said controversy might be made the subject of an action; and

WHEREAS, it has been agreed between said parties to submit said controversy to arbitration, pursuant to Title VIII, of Chapter XVII, of the Code of Civil Procedure of the State of New York;

NOW, THEREFORE, we, the said parties hereto, hereby mutually covenant and agree to and with each other to submit all and every of the demands, causes of action, defenses, issues, and controversies involved in or concerning plaintiffs' said claim, the same being stated in or raised by the aforesaid pleadings to Morgan J. O'Brien and James S. Clarkson and N. Wetmore Halsey, as arbitrators (hereinafter referred to as the "Arbitrators"), who shall arbitrate, judge and determine, and, subject to the other provisions hereof, make a mutual, final and definite award of and concerning the same and the whole thereof, and we do mutually covenant and agree to and with each other that the final judgment entered pursuant hereto shall in all things by us and each of us, and the executors, administrators and successors of us and each of us, be well and faithfully kept, observed and performed and shall constitute a complete and final adjudication of and bar to said claim of the plaintiffs upon

whatsoever ground the same may be urged; provided, however, that such award shall be made in writing under the hands and seals of all or of a majority of the said Arbitrators or of the Arbitrators then acting hereunder, ready to be delivered to the parties hereto, or one of them, on or before a day sixty (60) days subsequent to the closing of the proofs of the parties and the final submission of the matter to the Arbitrators for their decision.

The taking of the oath required by Section 2369 of the Code of Civil Procedure of the State of New York by said Arbitrators, or any of them, is hereby waived.

Except as herein otherwise expressly provided, the proceedings hereunder, including the amendment of pleadings, the taking of testimony, arguments of counsel, the form of the Arbitrators' decision and award, and all other matters incident to the presentation, trial and decision of said controversy shall be governed by the same rules as those applicable to a civil action pending in the Supreme Court of the State of New York in New York County and tried before a referee to hear and determine all of the issues of law and fact therein, and all questions affecting the admission or rejection of evidence and all questions involved in the decision of said controversy shall be determined in accordance with the rules of law, as if said controversy were the subject of a civil action pending in the Supreme Court of the State of New York in said New York County; provided that no amendment of the complaint that shall introduce a new or different cause of action shall be permitted.

Judgment of the Supreme Court of the State of New York shall be rendered upon the award to be made here-

under by the Arbitrators and such judgment shall be entered in the County of New York.

Any award made hereunder may be vacated or modified, not only upon any of the grounds set forth in Sections 2374 and 2375 of the Code of Civil Procedure of the State of New York, but likewise upon any ground upon which a motion for a new trial in a civil action involving the issues pending in the Supreme Court of the State of New York might be granted, and from any order vacating an award hereunder or from any judgment entered upon any award hereunder or upon any order confirming, modifying or correcting any such award, an appeal shall lie to the same courts and upon the same conditions as if such appeal were taken from a judgment entered in New York County in an action pending in the Supreme Court of the State of New York, and such order of vacation or judgment may be reversed or modified upon any of the grounds and for any of the reasons and in the same manner upon and in which an order granting a new trial or a judgment in a civil action pending in said Supreme Court may be reversed or modified.

If any award made hereunder shall be vacated on any ground so that a new trial of any of the matters at issue shall be required, the controversy hereby submitted to arbitration shall, so far as a new trial thereof shall be so required, be re-submitted to the same Arbitrators hereinabove named, or their successors appointed as herein provided, for a second hearing and determination thereof, despite the fact that the time fixed herein for the original determination of said controversy shall

have expired, and in that case all of the provisions hereof shall, so far as applicable, be observed upon such second hearing and determination.

The hearings hereunder shall take place at the office of said Morgan J. O'Brien, who is hereby named as the President of said Arbitrators, or his successor as such President, or at such other place (within or without the State of New York), and at such times as the Arbitrators may by their unanimous order appoint, but only upon five (5) days' notice in writing given by the President of the Arbitrators to the Arbitrators and to the counsel for the parties hereto, respectively; provided that a majority of the Arbitrators may adjourn the hearings from day to day, or from time to time, and with intervals of more than or less than five (5) days between hearings, without the giving of any notice, save an announcement when such adjournment is taken.

The Arbitrators may appoint a stenographer or stenographers to report the evidence and arguments of counsel and to transcribe the same. It shall not be necessary for any witness to read over or sign any transcript of his testimony, but a complete statement and transcript of all of the proceedings and evidence had and taken hereunder, certified to be such by the Arbitrators, or a majority of them, shall be attached to their award, and shall be conclusively presumed to be a correct statement of all the proceedings so had and evidence so taken. The compensation of the Arbitrators shall be fixed by said Arbitrators, or a majority of them, and such compensation, together with the expenses of the Arbitrators, and the charges of stenographers (except such part of any thereof as may have been paid by the defeated party hereto), and

likewise the costs and disbursements of the successful party hereto, may be taxed and judgment rendered therefor, as in a civil action pending in the Supreme Court of the State of New York. The fees and expenses of the Arbitrators and of the stenographer or stenographers employed by them shall be paid, in the first instance, by the parties hereto in equal shares, but the successful party may pay the whole of the fees and expenses of the Arbitrators and likewise the whole of the fees and charges of any stenographer or stenographers employed hereunder, and in such case shall be entitled to have the same taxed as his necessary disbursements and to have judgment for the entire amount or amounts so paid.

In event any of said Arbitrators shall resign or die or shall refuse or be disabled or shall unreasonably neglect to discharge any of his duties as Arbitrator, the remaining Arbitrators or Arbitrator may appoint a successor of any such Arbitrator from any list of names of qualified persons submitted to them or him as hereinafter provided or may make such appointment, in the absolute discretion of such remaining Arbitrators or Arbitrator, if no such list shall be submitted within the time hereinafter permitted therefor. In any such case, any substitute for said James S. Clarkson or any successor of said Clarkson shall be appointed from a list of not less than three names so submitted by the plaintiffs and any substitute for said N. Wetmore Halsey or any successor of said Halsey shall be so appointed from a list of not less than three names so submitted by the defendant, and any substitute for said Morgan J. O'Brien or any successor of said Morgan J. O'Brien shall be appointed from a list of not less than three names so submitted by the parties

hereto jointly, provided that in each such case such list shall be submitted within seven (7) days after written notice so to do is given by such remaining Arbitrators or Arbitrator to the party or parties entitled to make such nominations. In case of any such substitution of one person for another as such Arbitrator, there shall not be any retaking or rehearing of the testimony given or proceedings had before the appointment of such substitute, but such substitute shall become acquainted with the same by reading a transcript of the stenographer's minutes thereof and every such rehearing and all such retaking of testimony is hereby expressly waived.

IN WITNESS WHEREOF, WALSTON H. BROWN and HERBERT P. BROWN, parties of the first part, have hereunto set their hands and affixed their seals, and WESTERN PACIFIC RAILWAY COMPANY, party of the second part, has caused this agreement to be signed by its President and its corporate seal to be hereunto affixed, attested by its Assistant Secretary, as of the day and year hereinabove first written.

WALSTON H. BROWN, [SEAL]

HERBERT P. BROWN, [SEAL]

WESTERN PACIFIC RAILWAY COMPANY,

By E. T. JEFFERY,

[CORPORATE SEAL OF RAILWAY CO.] President.

Attest:

L. R. BUSH,

Assistant Secretary.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 25th day of February, 1907, before me came personally Walston H. Brown and Herbert P. Brown, to me personally known and known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same.

JOSEPH J. SCHMIDT,
Notary Public (No. 208),
New York County, N. Y.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 28th day of February, in the year 1907, before me personally came Edward T. Jeffery and L. R. Bush, to me known, who being by me severally duly sworn, did each for himself, and not one for the other, depose and say that he, the said Edward T. Jeffery, resided in Chicago, Illinois, and that he, the said L. R. Bush, resided in Passaic, New Jersey; that they are, respectively, the President and Assistant Secretary of the Western Pacific Railway Company, the corporation described in and which executed the above instrument; that they knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal and that it was so affixed by order of the Board of Directors of said corporation and that they signed their names thereto by like order.

GEORGE S. FRANKLIN,
Notary Public (No. 175),
New York County, N. Y.

[SEAL]

Exhibit "A."

WALSTON H. BROWN and HERBERT P. BROWN,
Plaintiffs,

AGAINST

WESTERN PACIFIC RAILWAY COMPANY,
Defendant.

PLAINTIFFS ABOVE NAMED, COMPLAINING OF ABOVE-NAMED DEFENDANT, BY DOS PASSOS BROS. AND PHILBIN, BEEKMAN & MENKEN, THEIR ATTORNEYS, FOR A FIRST CAUSE OF ACTION ALLEGE:

FIRST.—That the plaintiffs are residents of the State of New York, and that at all times hereinafter mentioned, they were and still are co-partners engaged in carrying on the business of bankers and railroad builders and contractors, doing business in the City of New York under the firm name and style of Walston H. Brown and Brothers.

SECOND.—That the defendant, the Western Pacific Railway Company, is a foreign corporation created by and organized and existing under and pursuant to the laws of the State of California, having, among others, the following powers named and enumerated in its certificate of incorporation, to wit: To construct, purchase, lease, own, acquire, operate and maintain lines of railroad within the State of California, Nevada and Utah, and to

carry passengers and freight on and over said lines of railroad for hire, and to construct, own, lease, maintain and operate lines of telegraph and telephone in connection therewith.

THIRD.—That heretofore and between the month of August, 1904, and the month of January, 1905, at the City of New York, the defendant company entered into an agreement with the plaintiffs to employ them and did thereupon employ them to supervise the construction of the line of railroad of the defendant from the City of San Francisco, in the State of California, to Salt Lake City, in the State of Utah; to assist the defendant, its officers and agents, in the location of its said line of railroad and the method of the construction of the same, and in the selection of contractors to build the said railroad, and in the supervision of the preparation of the contracts to be made with such contractors by the plaintiff for the construction of its railroad, and in the various other matters appertaining to the construction and completion of defendant's said line of railroad; to assist the defendant in the preparation of a mortgage to secure an issue of Fifty million dollars of bonds to be issued by the defendant for the purpose of raising sufficient money to accomplish the above mentioned objects, and in devising plans to give said bonds a substantial value; and also to find and procure for the defendant a purchaser or purchasers for the said bonds and to assist the defendant in the sale thereof; it being understood that the defendant should not be liable on the said agreement in the event of its failure to sell and dispose of the aforesaid bonds.

FOURTH.—That for and in consideration of the services to be rendered by the plaintiffs to the defendant as in paragraph Third of this complaint set forth and alleged, the defendant promised and agreed to pay to the plaintiffs a sum of money equivalent to five per centum of the cost of the construction of the said line of railroad of the defendant, extending from the City of San Francisco, in the State of California, to Salt Lake City, in the State of Utah, excluding the cost of its terminals.

FIFTH.—That from the said month of August, 1904, and from the time of the making of the aforesaid contract, the plaintiffs, at the City of New York and in pursuance and fulfillment of the said contract, rendered to the defendent company the services therein mentioned, and performed all the conditions on their part to be performed, and from the said month of August, 1904, and from the time of the making of the said contract until the month of August, 1905, were, among other things, constantly in consultation with the defendant, its officers and agents, and in giving it and them advice and counsel with respect to the location of the said line of railroad of the defendant; the location, arrangement and construction of its terminals, the method of construction of the said railroad and the employment of engineers in connection therewith, and also in the preparation and form of the mortgage to be executed by the defendant to secure its said issue of Fifty million dollars of first mortgage bonds, for the purpose of providing money for the above mentioned purposes; and in the preparation and securing of traffic and other agreements with other railroads, for the purpose of providing freight and tonnage for its railroad, and for the purchase of such junior securities of the defendant as might be necessary to com-

plete and equip its said line of railroad, in the event of the cost thereof exceeding the money to be received by the defendant from the sale of its said first mortgage bonds.

That the plaintiffs also found and procured purchasers for all of the said first mortgage bonds of the defendant, amounting to Fifty million dollars par value thereof at a price and upon terms satisfactory to the defendant, and at the City of New York the defendant accepted the offer of the said purchasers so procured by the plaintiffs and sold the said bonds to the said purchasers, and in pursuance of said offer the defendant, on or about the twenty-third day of June, 1905, in the City, County and State of New York, executed and, at the said time and place, acknowledged its certain mortgage bearing date as of the first day of September, 1903, the said mortgage being executed to the Bowling Green Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its office in the City, County and State of New York, as Trustee, to secure an issue of Fifty million dollars of its First Mortgage Five per cent. Thirty-year Gold Bonds, which said bonds were executed, issued and negotiated in the City of New York, and by their terms expressly provided for the payment of the principal thereof "at the office or agency of the Railway Company in the City of New York, State of New York", and also by their terms expressly provided for the payment of the interest coupons thereon "at its office or agency in the City of New York, in the State of New York", or at the office of the Railway Company in the City of San Francisco, in the State of California, which said office or agency in the City of New York, the defendant covenanted to keep and did keep;

that said mortgage was so made and constituted a lien upon certain personal property including stocks, bonds and other securities, which it was expressly provided in said mortgage should be delivered to and retained by the Trustee, the said Bowling Green Trust Company, and also made and constituted a lien, amongst other things, on all the line of railroad then owned or thereafter to be acquired or constructed by it; and the defendant thereupon agreed to sell and did sell in the City of New York all of the said bonds to the said purchasers procured by plaintiffs, and that said sale was effected through the efforts of the plaintiffs, and that the purchasers of said bonds were procured through the efforts of the plaintiffs, and that plaintiffs have duly performed all the conditions on their part.

SIXTH.—That since the month of August, 1905, the defendant has not requested the plaintiffs to render it any further services in connection with the construction of its line of railroad, or given it any opportunity to do so, and has refused to allow the plaintiffs so to do, although the plaintiffs, at all times, have been ready and willing to render such services and to give such advice, and from time to time have requested the defendant to be allowed so to do; and that the defendant has refused to allow the plaintiffs to render any further services as in said contract provided, and has also refused to pay the plaintiffs any sums of money for the services rendered by them in accordance therewith.

Plaintiffs further allege that they are still ready and willing and desirous of completing the said contract according to the provisions thereof, in all respects, and to

furnish all the additional work, labor and services required of them in accordance with the terms thereof.

SEVENTH.—The plaintiffs further allege, upon information and belief, that defendant has entered into a certain contract or contracts with certain persons or corporations to construct its said line of railroad from the City of San Francisco, California, to Salt Lake City, Utah, for the sum of forty million dollars or thereabouts, and that the said persons or corporations are now engaged in the actual construction thereof; and that defendant has refused and declined to consult plaintiffs with respect to the execution of the said contract or the provisions thereof, or as to the form and sufficiency thereof, and has refused to allow or permit the plaintiffs to supervise the construction of said line of railroad under the terms of the said contract, or in any other manner, and has repudiated the said contract and has refused to pay plaintiffs the said consideration therein named, or any part thereof, although plaintiffs have duly demanded payment of the same.

That the plaintiffs have been, at all times, ready and willing and are still ready and willing to exercise such supervision and carry out all the provisions of the aforesaid contract on their part still to be performed, but that by reason of the above mentioned action of the defendant, they are unable and will continue to be unable so to do, and by reason of said acts of the defendant, they have been damaged to the extent of one million dollars, which said sum of money the defendant promised and agreed to pay to them. That said sum of money is now due and owing to them from the defendant.

AND FOR A SECOND AND FURTHER CAUSE OF ACTION THE ABOVE-NAMED PLAINTIFFS, REPEATING THE ALLEGATIONS IN PARAGRAPHS FIRST, SECOND AND THIRD OF THE FIRST CAUSE OF ACTION HEREIN CONTAINED, FURTHER SET FORTH AND ALLEGE:

EIGHTH.—That from the month of August, 1904, and from the date of the making of the said contract, and until the month of August, 1905, at the City of New York, the plaintiffs rendered to the defendant company, its officers and agents, at its and their special instance and request, their services in giving to it and them advice and counsel with respect to the location of the said line of railroad of the defendant; the location, arrangement and construction of its terminals, the method of construction of the said railroad and the employment of engineers in connection therewith, and also in the preparation and form of the mortgage to be executed by the defendant to secure its said issue of fifty million dollars of first mortgage bonds, for the purpose of providing money for the above-mentioned purposes; and in the preparation and securing of traffic and other agreements with other railroads, for the purpose of providing freight and tonnage for its railroad, and for the purchase of such junior securities of the defendant as might be necessary to complete and equip its said line of railroad, in the event of the cost thereof exceeding the money to be received by the defendant from the sale of its said first mortgage bonds; and in the procurement of purchasers for the said first mortgage bonds of the defendant amounting to fifty million dollars par value thereof, and in placing and selling the said bonds of the defendant for and on behalf of the defendant.

NINTH.—Plaintiffs further allege that the defendant, at the City of New York, accepted the offer of the said purchasers so procured by the plaintiffs and sold the said bonds to the said purchasers, and in pursuance of said offer the defendant, on or about the twenty-third day of June, 1905, in the City, County and State of New York, executed and, at the said time and place, acknowledged its certain mortgage bearing date as of the first day of September, 1903, the said mortgage being executed to the Bowling Green Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its office in the City, County and State of New York, as Trustee, to secure an issue of fifty million dollars of its First Mortgage Five Per Cent. Thirty-Year Gold Bonds, which said bonds were executed, issued and negotiated in the City of New York, and by their terms expressly provided for the payment of the principal thereof "at the office or agency of the Railway Company in the City of New York, State of New York," and also by their terms expressly provided for the payment of the interest coupons thereon "at its office or agency in the City of New York, in the State of New York," or at the office of the Railway Company in the City of San Francisco, in the State of California, which said office or agency in the City of New York the defendant covenanted to keep and did keep; that said mortgage was so made and constituted a lien upon certain personal property including stocks, bonds and other securities, which it was expressly provided in said mortgage should be delivered to and retained by the Trustee, the said Bowling Green Trust Company, and also made and constituted a lien, amongst other things, on all the line of railroad

then owned or thereafter to be acquired or constructed by it; and the defendant thereupon agreed to sell and did sell in the City of New York all of the said bonds to the said purchasers procured by plaintiffs, and that said sale was effected through the services and efforts of the plaintiffs, and that the purchasers of said bonds were procured through the services and efforts of the plaintiffs, and that plaintiffs have duly performed all the conditions on their part.

TENTH.—That since the month of August, 1905, the defendant has not called on the plaintiffs or given the plaintiffs any opportunity to render it any further servrailroad, and has wholly refused to allow the plaintiffs ices in connection with the construction of its line of to render it any further services or to pay plaintiffs their commissions and compensation then due and owing for the services rendered by them as aforesaid, to the great loss and damage of the plaintiffs in the sum of one million dollars.

ELEVENTH.—That the said services rendered to the defendant company by the plaintiffs as aforesaid, were of the value and were reasonably worth the sum of one million dollars, which said sum became due and payable to plaintiffs on or before the first day of November, 1905.

TWELFTH.—That the said defendant company has not paid said sum of one million dollars, or any part thereof, although payment thereof has been duly demanded.

Wherefore plaintiffs demand judgment against the defendant by reason of the matters heretofore alleged in this their complaint upon their first cause of action, in the

sum of one million dollars, with interest thereon from the first day of November, 1905, and upon their second cause of action, in the sum of one million dollars, with interest thereon from the first day of November, 1905, together with the costs and disbursements of this action.

Dated New York, February 25, 1907.

Dos Passos Bros.
and
Philbin, Beekman & Menken,
Attorneys for Plaintiffs,
Office & Post Office Address,
No. 20 Broad Street,
Borough of Manhattan,
City of New York.

Exhibit "B."

Before—MORGAN J. O'BRIEN,
JAMES S. CLARKSON and
N. WETMORE HALSEY,
Arbitrators.

WALSTON H. BROWN and HERBERT P. BROWN,
Plaintiffs,

AGAINST

WESTERN PACIFIC RAILWAY COMPANY,
Defendant.

Now comes the defendant above-named, by Byrne & Cutcheon, its attorneys, and answering the complaint of the plaintiff above-named, shows to the Court:

FOR ANSWER TO THE FIRST ALLEGED CAUSE OF ACTION IN THE SAID COMPLAINT CONTAINED:

I.

1. Defendant admits that plaintiffs were at the times mentioned in the complaint and still are co-partners engaged in business in the City of New York under the firm name and style of "Walston H. Brown & Brothers," but defendant denies that it has any knowledge or information sufficient to form a belief as to whether plaintiffs are residents, or either of them is a resident, of the State of New York, or as to the exact nature of the business carried on by plaintiffs or either of them.

2. Defendant admits that it is a corporation created, organized and existing under and pursuant to the laws of the State of California, having the powers stated in paragraph Second of said complaint, which are provided for in its Articles of Incorporation.

3. Defendant denies that, at any time or place whatsoever, defendant entered into an agreement with the plaintiffs of the terms, substance or effect stated in paragraph Third of the complaint or of any terms, substance or effect, and defendant denies that it did at any time or place enter into any agreement whatsoever with the plaintiffs or either of them, and defendant alleges that it has never at any time given to, or conferred upon, any person or body any authority whatsoever to enter into any agreement with anyone of the terms, substance or effect of the pretended agreement alleged in said paragraphs of the complaint or to enter into any agreement whatsoever with the plaintiffs or either of them.

4. Defendant denies that in consideration of the services described in said paragraph Third of said complaint to be rendered to defendant by plaintiffs, or in consideration of any other matter or thing, defendant promised or agreed to pay to plaintiffs or either of them a sum of money equivalent to five per centum (5%) of the cost of the construction of any line of railroad of defendant, exclusive of the cost of its terminals, or any other sum of money whatsoever.

5. Defendant denies that, at any time or place whatsoever, plaintiffs, whether in pursuance or fulfillment of

any contract or otherwise, rendered to defendant the services mentioned in any contract or in said complaint or any services whatsoever, and defendant denies that plaintiff performed all of the conditions of any contract with the defendant by them to be performed, and denies that for any period whatever plaintiffs were constantly in consultation with the defendant, its officers or agents, and likewise, that the plaintiffs were engaged or took any part in the preparation of, or in advising or consulting with reference to, the form of any mortgage to be executed by defendant or in the preparation or securing of traffic or other agreements with other railroads for any purpose whatsoever or of agreements for the purchase of any junior securities of the defendant. Defendant denies that plaintiffs found or procured purchasers for any of its first mortgage bonds amounting to Fifty million dollars ($50,000,000), par value, at a price and upon terms satisfactory to defendant, or at any price or upon any terms, whether at the City of New York or elsewhere, and denies that the defendant accepted any offer of any purchasers procured by plaintiffs, and denies that in pursuance of any such offer defendant, at any time or place, executed, acknowledged or delivered its mortgage to the Bowling Green Trust Company, as Trustee, bearing date September 1, 1903, to secure the issue of Fifty million dollars ($50,000,000) of its First Mortgage Five Per Cent. Thirty-Year Gold Bonds or any mortgage whatsoever, and denies that in pursuance of any such offer defendant executed, issued or negotiated, whether in the City of New York or elsewhere, any of the bonds provided for in any such mortgage. Defendant admits that on or about the 23d day of June, 1905,

it did execute, acknowledge and deliver to the Bowling Green Trust Company, as Trustee thereunder, a certain mortgage bearing date September 1, 1903, to secure an issue of Fifty million dollars ($50,000,000), face value, of its First Mortgage Five Per Cent. Thirty-Year Gold Bonds and that it did execute, issue and sell in the City of New York certain of the bonds provided for in said mortgage and that said bonds provide by their terms that the principal thereof shall be payable at an office or agency of the Railway Company in the City of New York and that the interest coupons appertaining thereto shall be payable at such office or agency or at the office of the Railway Company in the City of San Francisco, California, and likewise admits that said Bowling Green Trust Company is a corporation organized and existing under and by virtue of the laws of the State of New York, but defendant expressly denies that it now keeps or ever has kept any office in the City or State of New York, and defendant alleges that in and by its said First Mortgage it is provided that, until after September 1, 1908, or the prior completion and equipment of its line of railway, the agent of the Railway Company in the City of New York for the payment of interest upon its said bonds shall be said Bowling Green Trust Company, and defendant alleges that the only agency at any time heretofore maintained by defendant in the City of New York has been for the payment of interest upon its said bonds and that the office of said Bowling Green Trust Company has been such agency. Defendant admits that said mortgage executed by it as aforesaid constitutes and ever since its execution has constituted a lien upon certain shares of stock in cor-

porations existing under the laws of the State of California and that certificates representing said shares of stock, or some of them, have been delivered to said Bowling Green Trust Company, as Trustee under said mortgage. Defendant likewise admits that said mortgage likewise constitutes and since its execution has constituted a lien, among other things, upon all of the line of railroad then owned or thereafter to be acquired or constructed by defendant. Defendant denies that upon the execution of said mortgage it agreed to sell, or did sell, in the City of New York or anywhere, all of said bonds to purchasers procured by plaintiffs, and denies that any sale of said bonds was effected through the efforts of the plaintiffs and that purchasers of said bonds were procured through the efforts of plaintiffs. Defendant denies that it has any knowledge or information sufficient to form a belief as to any allegation made or contained or as to any matter or thing set forth in paragraph Fifth of said complaint other than such thereof as are in this paragraph of the answer denied or admitted.

6. Defendant admits that defendant has not requested plaintiffs to render any services in connection with the construction of its line of railroad or any services whatever and that it has not given plaintiffs any opportunity so to render to it any such or any services. Defendant denies that it has any knowledge or information sufficient to form a belief as to whether plaintiffs at all times or at any time have been ready or willing to render any services or to give any advice to the defendant, or as to what, if any, services or advice plaintiffs have been ready and willing to render or give. Defend-

ant denies that it has refused to allow plaintiffs to render any services as in any contract between plaintiffs and defendant provided and denies the existence of any contract between plaintiffs and defendant. Defendant admits that it has refused to pay plaintiffs any sum of money whatsoever, whether in accordance with said pretended contract or otherwise. Defendant denies that plaintiffs have from time to time or at any time requested defendant to allow them to render services in connection with the construction of its line of railroad, but admits that about August, 1905, plaintiff, Walston H. Brown, notified defendant that he claimed that a contract existed between himself and defendant for the performance of certain services by him for defendant and likewise claimed that he, the said plaintiff Walston H. Brown, was entitled to be given and to be permitted to perform a contract for the building of its said line of railway, and defendant alleges that defendant thereupon promptly notified said Walston H. Brown that no such contract existed or had ever been made, and that defendant should and did refuse to pay said Walston H. Brown or anyone for any services of the character of the pretended services in the complaint alleged to have been performed by plaintiffs. Defendant denies that it has any knowledge or information sufficient to form a belief as to whether plaintiffs are ready or willing or desirous of completing said pretended contract alleged to be set forth in the complaint, whether in accordance with the alleged provisions thereof, as so set forth, or otherwise, or to furnish all or any of the additional work, labor or services required of them by or in accordance with the alleged terms of such pretended contract.

7. Defendant admits that it has entered into certain contracts with E. B. & A. L. Stone to construct and prepare for the laying of rails that portion of the road-bed of its projected line of railway extending from Twenty-fifth Avenue, in the City of Oakland, California, to Oroville, in said State, including grading, tunneling, masonry, bridges, trestles, embankments and culverts, and that it has entered into certain other contracts with the Utah Construction Company for the construction of the roadbed of the remainder of its said projected line of railway, including the same items of construction, except that part of said line extending from the easterly boundary line of the State of California to Silver Zone Pass, in the State of Utah, being about one hundred and ten (110) miles westerly of Salt Lake City. Defendant denies that it has let any contract for the construction of said last-mentioned portion of its projected line of railroad. Defendant denies that the aggregate amount by it to be paid under such contracts above mentioned is the sum of Forty million dollars ($40,000,000) or thereabouts and alleges that the sums so to be paid amount in the aggregate to less than the sum of Thirteen million dollars ($13,000,000). Defendant admits that said E. B. & A. L. Stone and said Utah Construction Company are now engaged in the actual performance of said contracts. Defendant admits that it did not consult with plaintiffs in respect of the execution of said contracts or any of them or with reference to any of the provisions of the same, or as to the form and sufficiency of said contracts, or any of them, and admits that heretofore and sometime during the summer or fall of 1905 defendant notified said Walston H. Brown that it did not intend

to permit said Walston H. Brown to construct or supervise the construction of said line of railroad. Defendant denies that it has repudiated any contract, but admits that it has refused to pay the plaintiffs any sum of money whatsoever, although plaintiffs have demanded the payment to them by defendant of the sum of One million dollars ($1,000,000). Defendant denies that it has any knowledge or information sufficient to form a belief as to whether plaintiffs have at all times, or at any time, been ready or willing and as to whether they still are ready or willing to exercise supervision of the construction of defendant's said line of railroad, or to carry out all or any of the alleged provisions of said pretended contract. Defendant expressly denies that the plaintiffs have been damaged by reason of any acts or things set out in the complaint or any act or acts of the defendant to the extent of One million dollars ($1,000,000) or of any other sum, and defendant denies that it promised or agreed to pay to the plaintiffs the sum of One million dollars ($1,000,000) or any other sum, and defendant denies that said sum of money or any sum whatsoever is due or owing from it to the plaintiffs. Except as hereinabove specifically denied or admitted, defendant denies each and every allegation, matter or thing set forth in paragraph Seventh of the complaint.

8. Defendant denies that it has any knowledge or information sufficient to form a belief as to any allegation, matter or thing set out in the statement of the First Alleged Cause of Action contained in the complaint not hereinbefore expressly denied or admitted.

II.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO SAID FIRST ALLEGED CAUSE OF ACTION, DEFENDANT REPEATS AND RE-ALLEGES EACH AND EVERY ALLEGATION AND STATEMENT CONTAINED IN THE FOREGOING PARAGRAPHS, 1 TO 8, OF THIS ANSWER, AND DEFENDANT UPON INFORMATION AND BELIEF FURTHER ALLEGES:

9. That neither any agreement between the plaintiffs and defendant such as the plaintiffs in their complaint allege to have been made, nor any agreement between plaintiffs and defendant with reference to the construction of defendant's said line of railway or the execution or negotiation of its said First Mortgage Bonds or with reference to any subject or subjects mentioned in the complaint, nor any agreement whatsoever between plaintiffs and defendant, was ever made in or reduced to writing or subscribed by either of the parties thereto or by any agent of any such party, and that no note or memorandum in writing of said agreement was ever made in or reduced to writing or subscribed by either of the parties thereto or by any agent of any such party, and that if any such agreement or any agreement between the said parties was ever made, the same is and always has been void under and by virtue of the provisions of Section 21 of the Personal Property Law of the State of New York; and defendant alleges that, if any such agreement or any agreement with reference to the performance of services by plaintiffs for defendant was ever made between plaintiffs and defendant, the same was negotiated and made in the State of New York and provided, among other things, as a necessary and integral part thereof, for a

continuing service to be performed by plaintiffs, a part whereof was by the terms of such agreement, if any such agreement was ever made, to be performed after the expiration of one year from the date of the making of such agreement.

III.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO SAID FIRST ALLEGED CAUSE OF ACTION, DEFENDANT REPEATS AND RE-ALLEGES EACH AND EVERY ALLEGATION AND STATEMENT CONTAINED IN THE FOREGOING PARAGRAPHS, 1 TO 9, OF THIS ANSWER, AND DEFENDANT UPON INFORMATION AND BELIEF FURTHER ALLEGES:

10. That heretofore, in the month of December, 1904, and thereafter, prior to the making of the contract between defendant and certain bankers, which is hereinafter in this paragraph referred to, plaintiffs admitted and declared that no contract existed between the plaintiffs and defendant with reference to the construction of defendant's said line of railway or the formulation or execution of its said First Mortgage Bonds or the mortgage securing the same or the negotiation of any of said bonds or with reference to anything connected with any of said matters, and that defendant was not under any obligation to compensate plaintiffs for any labor or time by them devoted to any of said matters; and defendant alleges that plaintiffs made such admissions and declarations with full knowledge that defendant was then negotiating with certain firms of bankers in the City of New York for the purchase by or through said bankers of First Mortgage Bonds to be issued by defendant, and that, if defendant should make a contract for the sale of said

bonds to a syndicate through said bankers, defendant would be obliged to pay said bankers a very large sum of money for their services in making or negotiating such sale, and that plaintiffs' admissions and declarations aforesaid would constitute an inducement to defendant to conclude said negotiations and to make such contract with said bankers; that thereafter defendant did conclude said negotiations and did enter into an agreement with said bankers, whereby said bankers agreed to use their best endeavors to form a syndicate satisfactory to the defendant which should purchase the First Mortgage Bonds thereafter to be issued by defendant, and defendant agreed to pay to said bankers a certain percentage of the face amount of the bonds so purchased (being a very large sum of money), and said bankers thereafter did form a syndicate that was approved by defendant, and defendant did sell unto the syndicate so formed forty-nine million five hundred thousand dollars ($49,500,000), face value, of its said bonds, and in consideration of the services of said bankers did pay unto said bankers a very large sum of money for their services in forming said syndicate and procuring the purchase of said bonds; that in the making of said contract and the sale of said bonds and the payment of such moneys to said bankers defendant relied, among other things, upon said admissions and declarations of plaintiffs; and defendant expressly alleges and avers that plaintiffs are estopped and concluded now or at any time hereafter to claim that defendant is under obligation to pay unto plaintiffs any sum of money whatsoever under or in connection with any agreement with reference to the construction of defendant's said line of railway or the for-

mulation or execution of its said First Mortgage Bonds or the mortgage securing the same or the negotiation of any of said bonds or with reference to anything connected with any of said matters, or to pay unto the plaintiffs any sum of money whatsoever on account of any labor performed or time expended by plaintiffs in connection with any such matter or matters.

IV.

For answer to the second alleged cause of action in said complaint contained.

11. Defendant denies that at any time or during any period, at the City of New York, or at any place, plaintiffs rendered to the defendant or to its officers or agents at its or their instance or request the services set forth in paragraph Eighth of the complaint, or any services whatsoever; and defendant denies that it ever required or requested plaintiffs to render the services set forth in paragraph Eighth of the complaint or any services whatsoever.

12. Defendant denies that at the City of New York, or at any other place, it accepted any offer of purchasers of any of its First Mortgage Bonds procured by plaintiffs or sold any of said bonds to purchasers procured by plaintiffs and denies that it executed its said First Mortgage at any time or place in pursuance of any offer procured by plaintiffs.

Defendant admits that on or about the 23d day of June, 1905, it did execute, acknowledge and deliver to the Bowling Green Trust Company, as Trustee thereunder, a certain mortgage bearing date September 1, 1903, to

secure an issue of Fifty million dollars ($50,000,000), face value, of its First Mortgage Five Per Cent. Thirty-Year Gold Bonds and that it did execute, issue and sell in the City of New York certain of the bonds provided for in said Mortgage and that said bonds provide by their terms that the principal thereof shall be payable at an office or agency of the Railway Company in the City of New York and that the interest coupons appertaining thereto shall be payable at such office or agency or at the office of the Railway Company in the City of San Francisco, California, and likewise admits that said Bowling Green Trust Company is a corporation organized and existing under and by virtue of the laws of the State of New York, but defendant expressly denies that it now keeps or ever has kept any office in the City or State of New York, and defendant alleges that in and by its said First Mortgage it is provided that, until after September 1, 1908, or the prior completion and equipment of its line of railway, the agent of the Railway Company in the City of New York for the payment of interest upon its said bonds shall be said Bowling Green Trust Company, and defendant alleges that the only agency at any time heretofore maintained by defendant in the City of New York has been for the payment of interest upon its said bonds and that the office of said Bowling Green Trust Company has been such agency. Defendant admits that said mortgage executed by it as aforesaid constitutes, and ever since its execution has constituted, a lien upon certain shares of stock in corporations existing under the laws of the State of California and that certificates representing said shares of stock, or some of them, have been delivered to said Bowling Green Trust Company, as Trustee under said

mortgage. Defendant likewise admits that said mortgage likewise constitutes, and since its execution has constituted a lien, among other things, upon all of the line of railroad then owned or thereafter to be acquired or constructed by defendant. Defendant denies that upon the execution of said mortgage it agreed to sell, or did sell, in the City of New York or anywhere all of said bonds to purchasers procured by plaintiffs, and denies that any sale of said bonds was effected through the efforts of the plaintiffs or that purchasers of said bonds were procured through the efforts of plaintiffs. Defendant denies that it has any knowledge or information sufficient to form a belief as to any allegation made or contained or as to any matter or thing set forth in paragraph Ninth of said complaint other than such thereof as are in this paragraph of the answer denied or admitted.

13. Defendant admits that defendant has not called upon plaintiffs for, or given plaintiffs any opportunity to render it any services in connection with the construction of its line of railroad, and that it has wholly refused to pay plaintiffs any commissions or compensation for any matter connected therewith; but defendant denies that any such commissions have been or any such compensation has been at any time due or owing to plaintiffs for any services rendered by them to the defendant, or otherwise; and defendant likewise denies that plaintiffs have suffered any loss or damage whether in the sum of One million dollars ($1,000,000) or any other sum by reason of such refusal upon the part of defendant or by reason of any other act or acts of the defendant.

14. Defendant denies that any services rendered by defendant to the plaintiffs, if any such ever were ren-

dered, were of the value or were reasonably worth the sum of One million dollars ($1,000,000) and defendant denies that said sum of One million dollars ($1,000,000), or any other sum, has ever become due and payable by defendant to the plaintiffs whether before any day of January, 1906, or at any other time.

15. Defendant admits that it has not paid the sum of One million dollars ($1,000,000), or any part of said sum, to the plaintiffs, and admits that the payment thereof has been demanded.

16. Defendant denies that it has any knowledge or informaton sufficient to form a belief as to any allegation, matter or thing set out in the statement of said second alleged cause of action not hereinbefore expressly denied or admitted.

V.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO SAID SECOND ALLEGED CAUSE OF ACTION, DEFENDANT REPEATS AND RE-ALLEGES EACH AND EVERY ALLEGATION AND STATEMENT CONTAINED IN THE FOREGOING PARAGRAPHS, 11 TO 16, INCLUSIVE, OF THIS ANSWER, AND DEFENDANT, UPON INFORMATION AND BELIEF, FURTHER ALLEGES:

17. That, if any request or requirement was ever made of plaintiffs by defendant such as plaintiffs in their complaint allege to have been made or that plaintiffs perform any services of any description whatsoever for defendant, or if any agreement with reference to any such services was ever made between plaintiffs and defendant, such request was made or such agreement was entered into in the State of New York, and in that case the same,

among other things, contemplated and provided for a continuing service to be performed by plaintiffs, a part whereof was by the terms of such request or agreement, if any such request or agreement was ever made, to be performed after the expiration of one year from the date of the making of such agreement, and neither any request by defendant of the plaintiffs nor any agreement between plaintiffs and defendant with reference to any such service or any services whatsoever was ever made in or reduced to writing or subscribed by either of the parties thereto or by any agent of any such party, and no note or memorandum in writing of any such request or agreement was ever made or subscribed by either of the parties thereto or by any agent of any such party, and if any such request or agreement ever was made, the same is and always has been void and of no effect by virtue of the provisions of Section 21 of the Personal Property Law of the State of New York.

VI.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO SAID SECOND ALLEGED CAUSE OF ACTION, DEFENDANT REPEATS AND RE-ALLEGES EACH AND EVERY ALLEGATION AND STATEMENT CONTAINED IN THE FOREGOING PARAGRAPHS, 11 TO 17, OF THIS ANSWER, AND DEFENDANT, UPON INFORMATION AND BELIEF, FURTHER ALLEGES:

18. That heretofore, in the month of December, 1904, and thereafter, prior to the making of the contract between defendant and certain bankers, which is hereinafter in this paragraph referred to, plaintiffs admitted and declared that no contract existed between the plaintiffs and defendant with reference to the construction of de-

fendant's said line of railway or the formulation or execution of its said First Mortgage Bonds or the mortgage securing the same or the negotiation of any of said bonds, or with reference to anything connected with any of said matters, and that defendant was not under any obligation to compensate plaintiffs for any labor or time by them devoted to any of said matters; and defendant alleges that plaintiffs made such admissions and declarations with full knowledge that defendant was then negotiating with certain firms of bankers in the City of New York for the purchase by or through said bankers of First Mortgage Bonds to be issued by defendant, and that, if defendant should make a contract for the sale of said bonds to a syndicate through said bankers, defendant would be obliged to pay said bankers a very large sum of money for their services in making or negotiating such sale, and that plaintiffs' admissions and declarations aforesaid would constitute an inducement to defendant to conclude said negotiations and to make such contract with said bankers; that thereafter defendant did conclude said negotiations and did enter into an agreement with said bankers, whereby said bankers agreed to use their best endeavors to form a syndicate satisfactory to the defendant which should purchase the First Mortgage Bonds thereafter to be issued by defendant, and defendant agreed to pay to said bankers a certain percentage of the face amount of the bonds so purchased (being a very large sum of money), and said bankers thereafter did form a syndicate that was approved by defendant, and defendant did sell unto the syndicate so formed forty-nine million five hundred thousand dollars ($49,500,000), face value, of

its said bonds, and in consideration of the services of said bankers did pay unto said bankers a very large sum of money for their services in forming said syndicate and procuring the purchase of said bonds; that in the making of said contract and the sale of said bonds and the payment of such moneys to said bankers defendant relied, among other things, upon said admissions and declarations of plaintiffs; and defendant expressly alleges and avers that plaintiffs are estopped and concluded now or at any time hereafter to claim that defendant is under obligation to pay unto plaintiffs any sum of money whatsoever under or in connection with any agreement with reference to the construction of defendant's said line of railway or the formulation or execution of its said First Mortgage Bonds or the mortgage securing the same or the negotiation of any of said bonds or with reference to anything connected with any of said matters, or to pay unto the plaintiffs any sum of money whatsoever on account of any labor performed or time expended by plaintiffs in connection with any such matter or matters.

Wherefore, defendant demands judgment that the plaintiffs take nothing by this proceeding and that it may be hence dismissed with its costs therein unjustly sustained.

BYRNE & CUTCHEON,
Attorneys for Defendant,
Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
New York City.

NEW YORK, February 25, 1907.

WESTERN PACIFIC RAILWAY COMPANY,
San Francisco, California.

DEAR SIRS:

In consideration of your Company's entering into an agreement for the arbitration of a certain controversy pending between your Company and ourselves, in accordance with an agreement for submission thereof dated Feb'y 25th, 1907, whereby said controversy is submitted to the judgment and determination of Morgan J. O'Brien, James S. Clarkson and N. Wetmore Halsey, we hereby agree that we will not cause or procure any part of a certain fund arising from the sale of First Mortgage Bonds of the Western Pacific Railway Company and now held by various bankers and depositaries as provided in the First Mortgage of said Western Pacific Railway Company, or any securities held as collateral by the Trustee under said mortgage, to be attached or otherwise impounded or levied upon by any legal process on account of the claim made by us and submitted to arbitration as above stated.

Yours very truly,

(Sgd.) WALSTON H. BROWN.
HERBERT P. BROWN.